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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-81374; File No. SR-Phlx-2017-63]

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Chapter VI, Section A of its Pricing Schedule Relating to the Exchange's Monthly Permit Fees for PSX Only Members

August 10, 2017

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup>, and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on July 31, 2017, NASDAQ PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Chapter VI, Section A of its Pricing Schedule relating to the Exchange's monthly permit fees for PSX only members. The text of the proposed rule change is available on the Exchange's Website at <http://nasdaqphlx.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Chapter VI, Section A of its Pricing Schedule to add a new exemption from the \$4,000 per month "PSX Only Permit Fee" that the Exchange assesses to "PSX only" members and member organizations. A "PSX only" member or member organization is one that only does business only [sic] on PSX and not on the PHLX options market.

Presently, the Exchange waives this Permit Fee if a PSX only member or member organization executes at least 1,000 shares per day, on average, in a given month. The Exchange proposes to also waive the Permit Fee during any month in which a PSX only member's or member organization's business on the Exchange is limited to "clearing-only." For the purpose of the proposal, the term "clearing-only" means that the PSX only member or member organization: (1) does not execute any trades on PSX throughout a given month; (2) maintains no active connections to execute trades on PSX during that month (either through its own MPID or through a sponsored access relationship on behalf of another member or member organization); and (3) maintains PSX membership for the sole purpose of clearing trades on behalf of another member or member organization that is actively trading on PSX.

The purpose of the proposal is to enhance its fee structure for members and member organizations that limit their business on the Exchange during a given month to only clearing trades on behalf of others. The Exchange has determined that assessing clearing-only members and member organizations a monthly PSX Only Permit Fee is unnecessary given that the PSX

Only Permit Fee exists for two purposes that do not apply to those that engage in clearing-only. First, the PSX Only Permit Fee serves as the price that members and member organizations pay for the privilege of executing trades on PSX. However, unlike other PSX members and member organizations, clearing firms do not obtain their PSX membership to execute trades and they do not, in fact, execute trades on PSX. The PSX Only Permit Fee also exists to defray the costs that the Exchange incurs to examine and oversee those of its members and member organizations for which the Exchange acts as the Designated Examination Authority. Again, however, the Exchange does not serve as the Designated Examination Authority for clearing-only firms and it therefore does not incur these costs.

Moreover, the Exchange believes that the assessment of the monthly PSX Only Permit Fee to clearing-only members and member organizations serves as a disincentive for clearing firms to provide their valuable services to other Exchange members and member organizations. The Exchange wishes to encourage, rather than discourage, clearing firms to participate on the Exchange. Indeed, the Exchange hopes that waiving the PSX Only Permit Fee for clearing-only members and member organizations will not only attract new clearing firms to PSX, but it will also more generally attract additional trading participation and trading on PSX. This proposal is part of an effort to nurture the growth of PSX.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>3</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>4</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among

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<sup>3</sup> 15 U.S.C. 78f(b).

<sup>4</sup> 15 U.S.C. 78f(b)(4) and (5).

members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>5</sup>

Likewise, in NetCoalition v. Securities and Exchange Commission<sup>6</sup> (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.<sup>7</sup> As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”<sup>8</sup>

Further, “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for

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<sup>5</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>6</sup> NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

<sup>7</sup> See NetCoalition, at 534 - 535.

<sup>8</sup> Id. at 537.

granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’ ....”<sup>9</sup> Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange believes that waiving the monthly PSX Only Permit Fee for clearing-only members and member organization is reasonable because no justification exists for charging this Fee to members and member organizations that do not use their membership to execute trades on PSX and are not subject to examination by the Exchange. The Exchange also believes that its definition of “clearing-only” is reasonable because it excludes those firms that are PSX members for purposes other than simply to clear transactions, those that execute even small volumes of trades during a given month, and even those that maintain an active capacity to execute trades during a month, either through its own MPID or through a sponsored access relationship. Finally, the Exchange proposes reasonable steps to ensure that those clearing firms that request waivers of the PSX Only Permit Fee in fact qualify for the waiver. It will require such firms to attest in writing to their “clearing-only” status as a condition of the Exchange granting them the waiver. The attestation form will also obligate firms to promptly notify the Exchange of any change in their statuses.

The Exchange believes that the proposal is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same fee waiver to all similarly situated members and member organizations that utilize their membership on the Exchange only to engage in clearing activities. Moreover, the Exchange believes that its proposal does not discriminate against PSX only members and member organizations that execute trades on PSX

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<sup>9</sup> Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

because such members and member organizations can and typically do qualify for their own waivers of the monthly Permit Fee when, in a given month, they meet or exceed an average daily trading threshold of 1,000 shares. When PSX only members and member organizations do not meet or exceed this monthly trading threshold, the Exchange believes that it is justified in continuing to charge them the Permit Fee insofar as the transaction fees they generate for the Exchange are not sufficient to offset their shares of the Exchange's regulatory oversight costs.<sup>10</sup>

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the proposed waiver of the monthly PSX Only Permit Fee will not impose any burden on competition. To the contrary, the Exchange believes that its proposal is

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<sup>10</sup> See also Securities Exchange Act Release No. 34-72784 (Aug. 7, 2014), 79 FR 47506 (Aug. 13, 2014) (discussing the Exchange's rationale for its existing PSX Only Permit Fee waiver).

pro-competitive because it may encourage additional clearing firms to provide clearing services on the Exchange, which in turn may attract additional trading participants and trading activity.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>11</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2017-63 on the subject line.

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission,  
100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2017-63. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should



submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2017-63, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

Robert W. Errett  
Deputy Secretary

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<sup>12</sup> 17 CFR 200.30-3(a)(12).

